KUAN KIM HOCK, IN RE

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-347-2003]
27 APRIL 2005

SUCCESSION: *Probate - Reconstruction of lost will - Application for order admitting to proof will - Whether supported by affidavit - Rules of the High Court 1980, O. 71 r. 46(1) & (2) - Probate and Administration Act 1959, s. 25*

This was an application by way of *ex parte* originating summons filed by the applicant under O. 71 r. 46(1) and (2) of the Rules of the High Court 1980 and s. 25 of the Probate and Administration Act 1959 for an order that: (1) the will be reconstructed as in exh. KKH1 and be accepted as the will of one Foo Tai Moi ('deceased') whose original will could not be found; and (2) the applicant be at liberty to take out the petition for the grant of probate for the estate of the deceased.

Held (order in terms of application):

[1] The application herein was supported by the applicant's affidavit where the grounds of application were set out, *viz*, evidence as to the due execution of the will; its existence after the demise of the testatrix; accuracy of the contents of the will as in the reconstruction in exh. KKH1 and the consent to the application by one Richard Tan Hu Song (son of the deceased) who had renounced his interest in the grant of the order. This was consistent with O. 71 r. 46(1) and (2) of the Rules of the High Court 1980. Thereafter, probate could be granted of the contents of the will, pursuant to s. 25 of the Probate and Administration Act 1959. (pp 711 h-i & 712 a-b, e)

Case(s) referred to:
Harris v. Knight [1890] 15 PD 170 ***(refd)***
Re Goods of Shaik Eman [1871] SLR Leic 278 ***(refd)***
Re Yelland, Broadbent v. Francis [1975] 119 Sol Jo 562 ***(refd)***
RM P RM P V Palaniyappan v. NPL ST MV Ramanathan Chettiar [1977] 2 MLJ 34 ***(refd)***
Wissler v. Wipperman [1955] P59; [1953] 1 All ER 764 ***(refd)***
Woodward v. Goulstone [1886] 11 App Cas 469 ***(refd)***

Legislation referred to:
Probate and Administration Act 1959, s. 25
Rules of the High Court 1980, O. 71 r. 46(1), (2)

For the applicant - Maslinda Muhamad; M/s Philip Chua & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Application

This is an application by way of *ex parte* originating summons filed by the applicant under O. 71 r. 46(1) and (2) of the Rules of the High Court 1980 and s. 25 of the Probate and Administration Act 1959 for an order that:

1. the will be reconstructed as in exh. KKH1 and be accepted as the will of one Foo Tai Moi ("the deceased") whose original will could not be found; and

2. the applicant be at liberty to take out a petition for the grant of probate for the estate of the deceased.

Factual Background

The affidavit in support was affirmed by the applicant who is the husband of one Evelyn Tan Poh Sim who in turn is the grand-daughter of the deceased.

From 1974 until her demise in 1991, the deceased who was a widow had been staying with the applicant, the applicant's wife and their son.

The applicant has been informed by his wife that the deceased had during her lifetime frequently told the applicant's wife that the deceased had intended to bequeath her entire estate to their son ie, the deceased's grandson named Kelvin Kuan Ting-Chia.

Upon the deceased's demise, the applicant and his wife had read the deceased's will which was prepared and executed in the office of Mr. Andrew Goh Tyau Soon an advocate and solicitor. A copy of the will had been kept by the applicant's wife.

Prior to this application, the applicant had not applied for the grant of probate for the deceased's estate because he thought it was unnecessary then, as he was under the impression that the deceased had not left any property on her demise.

Subsequently, it came to the applicant's knowledge that the deceased had during her lifetime made an application for the administration of the small estates of both her late husband one Tan Soo Boon and her late father-in-law one Tan Jiak Lim who died intestate in 1908 leaving a piece of land known as Lot 157 MCL II ("the land").

As the land has been classified as Malay Customary Land, it could not be transferred to the name of the deceased. The hearing of the deceased's application pursuant to the Small Estates (Distribution) Act 1955 had been fixed for 18 August 1994 which was after the date of the deceased's demise.

The applicant's father-in-law, one Tan Eng Wah, attended the hearing on 18 August 1994 but could not obtain an order as he was said to have no *locus standi* upon the deceased's demise.

The applicant then consulted his solicitors who advised him that Malay Customary Land could be transmitted under the law of succession, provided that probate has been obtained for the deceased's estate.

Efforts by the applicant's wife to trace the will on her own and from the advocate who prepared the will proved futile. Hence this application.

The applicant affirms that he can remember the content of the will, as that in exh. KKH1 for which he is now applying for reconstruction so as to enable him to obtain a grant of probate for the estate of the deceased. The deceased was survived by Evelyn Tan Poh Sim and Richard Tan Su Hong as the beneficiaries entitled to the estate of the deceased if the deceased had died intestate.

Deceased's two other children *viz.* Aster Foo Moi Lan and Foo Boon Jin had predeceased the deceased, while Richard Tan Su Hong had given his consent to the instant application.

Jurisdiction And Merits

In my view, the factual background as alluded to above would attract the application of O. 71 r. 46(1) in which the relevant portion reads:

> (1) An application for an order admitting to proof … a will contained in a … reconstruction … where the original will is not available, may be made to the court by summons:

Thereafter, probate may be granted of the contents of the will, pursuant to s. 25 of the Probate and Administration Act 1959 which merits reproduction as follows:

25 Probate of copy or draft or of contents

Where a will has been lost or mislaid after the death of the testator, or where a will cannot for any sufficient reason be produced:

(a) if a copy or draft thereof is produced, and it appears that the copy or draft is identical in terms with the original, probate may be granted of the copy or draft, limited until the original is admitted to probate; and

(b) if no copy or draft thereof is produced, probate may be granted of the contents of the will, if they can be sufficiently established, limited as above described, unless the will is a privileged will not in writing.

Under s. 25(b), evidence of the contents of a will may be proved to obtain a limited grant of probate where the original will has been lost or misplaced, and it cannot be found even after reasonable steps have been taken to search for it.

Section 25 may be invoked where the court is satisfied that the copy or draft of the will produced was identical with the original, as in *RM. P. RM. P. V. Palaniyappan v. N.PL. ST. M.V. Ramanathan Chettiar* [1977] 2 MLJ 34 at p. 37 left I and right F-G per Abdul Hamid J (later CJ Malaysia).

In *Re Goods of Shaik Eman* [1871] SLR Leic 278, probate of a copy of a lost will was granted where there was sufficient evidence of the existence of the original will after the death of the testator.

In Malaysia, the standard of proof required to prove the contents of a will is the establishment of a reasonable balance of probability: *Wissler v. Wipperman* [1955] P.59 at 65 [1953] 1 All ER 764 at 766; *Re Yelland, Broadbent v. Francis* [1975] 119 Sol Jo 562; and not beyond a reasonable doubt, which was the standard applied in *Harris v. Knight* [1890] 15 PD 170 at 179 (CA) per Lindley LJ, and in *Woodward v. Goulstone* [1886] 11 App Cas 469 at 475 (HL) per Lord Herschell LC (*The Annotated Satutes of Malaysia On Probate And Administration Act 1959*, MLJ series pp. 39 and 40).

The application before me is in effect seeking an order admitting to proof a will contained in a reconstruction where the original is not available and has been supported by the applicant's affidavit setting out the grounds of application, *viz.* evidence as to the due execution of the will; its existence after

the demise of the testatrix; accuracy of the contents of the will as in the reconstruction in exh. KKH1 and the consent to the application by Richard Tan Su Hong who has renounced his interest in the grant of the order. In my view, this is consistent with O. 71 r. 46(1) which has been referred to above and also O. 71 r. 46(2) (see *MLJ Series Administration of Estates Handbook* PI 182, para 172).

Order 71 r. 46(2) reads:

> (2) The application must be supported by affidavit setting out the grounds of the application and by such evidence on affidavit as the applicant can adduce as to:
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> (a) the due execution of the will;
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> (b) its existence after the death of the testator; and
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> (c) the accuracy of the copy of other evidence of the contents of the will,
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> together with any consents in writing to the application given by any persons not under disability who would be prejudiced by the grant.

Conclusion

On the foregoing grounds, I make an order in terms of this application.